Supreme Court, U.S.
FILED

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NO. ___

IN THE
SUPREME COURT OF THE UNITED STATES

GLENN D. DICKERSON, ET AL,
Petitioner,

v.

CITY OF DALLAS,
Respondent,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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5588

I

STATEMENT OF QUESTIONS PRESENTED

Whether, to be entitled to the partial overtime exemption of §7(k) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §207(k) for "any employee in fire protection activities", Respondent must prove that Petitioners spend no more than 20% of their work time in nonexempt activities?

If the answer to the first question is yes, whether the activities of Petitioners while working, for 50% of their work shifts, exclusively on ambulances as paramedics without fighting fires or performing rescues, are nonexempt activities which disqualify them from the partial overtime exemption of §7(k)?

If the answer to the first question is yes, whether the activities of Petitioners while working, for more than 20% of their work time, as paramedics in medical activities unrelated to fire, riots, crime scenes, natural disasters or accidents, are nonexempt activities which disqualify them from the partial overtime exemption of §7(k) of the FLSA?

PARTIES TO THE PROCEEDING

In addition to the parties in the caption, the following are additional Petitioners to this proceeding:

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Randy A. Holmes
Michael Buehler
Brent Rogers
Stephen Fultz
Douglas Mallon
Aaron Davis
Paul Overton
J.B. Thompson
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Gerald Jensen, Jr.
Charles E. Taylor
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Michael Hughes
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OFFICIAL AND UNOFFICIAL REPORTS

There are no known official or unofficial reports of the opinions and orders entered by either the Court of Appeals or the District Court below.

STATEMENT OF JURISDICTION

On March 24, 1998, the District Court for the Northern District of Texas entered an order granting Defendant's Motion for Summary Judgment and denying Plaintiff's Motion for Summary Judgment on the question of whether Plaintiffs were within the partial overtime exemption of Section 7(k) of the FLSA. 29 U.S.C. §207(k).

On May 18, 1999, the Fifth Circuit Courts of Appeals affirmed. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS

§7(k) of the FLSA provides a partial exemption from the Act's overtime requirements "with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities. " 29 U.S.C. §207(k)[1] (App. p. 30)

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1. Respondent has never claimed that Petitioners are engaged in law enforcement activities.

Department of Labor Regulations define "any employee in fire protection activities" as one who meets the threshold requirements of 29 C.F.R. §553.210(a)(App. p. 31):

> . . . the term . . . refers to any employee (1) who is employed by an organized fire department or fire protection district; (2) who has been trained to the extent required by state statute or local ordinance; (3) who has the legal authority and responsibility to engage in the prevention, control or extinguishment of a fire of any type; and (4) who performs activities which are required for, and directly concerned with, the prevention, control or extinguishment of fires, including such incidental nonfirefighting functions as housekeeping, equipment maintenance, lecturing, attending community fire drills and inspecting homes and schools for fire hazards. . . The term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities. See §553.215.

The regulations also provide that "[a]mbulance and rescue service employees of a public agency other than a fire protection" agency may be treated as "employees in fire protection . . activities". 29 C.F.R. §553.215(a)(App. p. 33) For such employees, the threshold requirements, otherwise known as the "substantially related standard", are that:

> their services are substantially related to firefighting or law enforcement in that (1) the ambulance and rescue service employees have received training in the rescue of fire, crime, and accident victims or firefighters or law enforcement personnel in the performance of their respective duties, and (2) the ambulance and rescue service employees are regularly dispatched to fires, crime scenes, riots, natural disasters and accidents.

The regulations substantially limit the amount of nonexempt activities which may be performed by an employee who otherwise meets the definition of an employee in fire protection activities. 29 C.F.R. §553.212(a)(App. p. 32). This limitation, otherwise known as the "80/20 Rule", provides:

> Employees engaged in fire protection activities. . as described in §553.210. . may also engage in some non-exempt work which is not performed as an incident or in conjunction with their fire protection . . activities. . The performance of such nonexempt work will not defeat the. . 7(k) exemption unless it exceeds 20 percent of the total hours worked by that employee during the workweek or applicable work period. A person who spends more than 20 percent of his/her work time in nonexempt activities is not considered to be an employee engaged in fire protection. . . activities . .

STATEMENT OF THE CASE

The District Court had original jurisdiction since Petitioners claim they have been denied overtime compensation for overtime hours, in violation of the FLSA. 29 U.S.C. § 216(a).

Petitioners are current and former employees of Respondent's Fire Department who were, at all times relevant to this action, "certified paramedics."[2] Petitioners fall within two categories:

35 Petitioners work two separate and distinct jobs. 50% of their work shifts are spent working exclusively as Mobile Intensive Care Unit ("MICU") crew members. As MICU crew members, their job is limited to treating and transporting patients; they do not and cannot fight fires or treat victims until they have been evacuated from a fire or accident.[3] MICU crew members report to the Emergency Medical Services Division.

The other 50% of the work shifts are spent working exclusively as fire engine crew members. As fire engine crew members, they can and do fight fires and rescue fire and accident victims.

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2. For purposes of brevity only, all of the facts are recited in the present tense.

3. Two Petitioners were able to recall one incident each where an emergency rescue was conducted as an MICU crew member.

As fire engine crew members, they also respond as paramedics to, and enter data for, strictly medical emergencies unrelated to fires, riots, crime scenes, natural disasters and accidents. These medical emergencies include breathing difficulties, injured persons, heart attacks, unconscious persons, emergency obstetrics, drug overdoses, medical alerts, emergency transfers and drownings. Fire engine crew members report to Division 1 or 2 of the Fire Department.

2 Petitioners spend 100% of their work shifts as paramedic engine crew members. As paramedic engine crew members, they perform duties similar to fire engine crew members.

It is undisputed that, for each Petitioner, more than 20% of his time is spent responding to, and entering data for, medical emergencies unrelated to fires, riots, crime scenes, natural disasters and accidents.

Petitioners acknowledge that, because of their firefighting responsibilities, they each satisfy the definition of an "employee in fire protection activities" in 29 C.F.R. §553.210(a). Petitioners claim, however, that when they are working on the MICU and when they are responding to, and entering data for, strictly medical emergencies, they are not engaged in fire protection activities. Since this work exceeds the 20% time limitation of 29 C.F.R. §553.212(a), they do not fall within the §7(k) exemption.

REASONS FOR GRANTING WRIT

In rejecting Petitioners' claims, the Court of Appeals below neither cited 29 C.F.R. §553.212(a) nor addressed the question of whether the 20% limitation on nonexempt activities had been satisfied. Instead, the Court of Appeals limited its analysis, as it had in *Bond v. City of Jackson, Miss.*, 939 F.2d 285 (5th Cir. 1991), to the question of whether Petitioners' activities satisfied the "substantially related" standard of 29 C.F.R. §553.215(a).[4]

For the reasons set forth below, the Court of Appeals decision conflicts with applicable decisions of this Court, conflicts with decisions of other Courts of Appeals and otherwise creates an anomalous legal standard that only this Court can now rectify.

I. The Court of Appeals Decision Below Conflicts With Applicable Decisions of this Court.

The Court of Appeals Decision below conflicts with decisions of this Court in three material respects:

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4. The Court based its reliance upon §553.215(a), even though the regulation is applicable by its express terms only to "[a]mbulance and rescue service employees of a public agency other than a fire protection . . . agency", on the reference to the regulation in §553.210(a).

A. The Court of Appeals Enlarged §7(k) By Implication.

This Court has said "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exemptions are not to be implied, in the absence of a contrary legislative intent." *Andrus v. Glover Constr. Co.*, 446 U.S. 616-17 (1980)(citing *Continental Cas. Co. v. United States*, 314 U.S. 527, 533 (1942)) FLSA exemptions, therefore, may not be enlarged by implication. *Addison v. Holly Hill*, 322 U.S. 607, 618 (1944); *Maneja v. Waialua Agricultural Co.*, 349 U.S. 254, 271 (1955)

This mandate is important here because neither §7(k) nor its legislative history reflects any intent to exempt employees who do substantial emergency medical activities in addition to their fire protection activities, much less employees who perform emergency medical activities and fire protection activities separately in two distinct jobs. *See* H.R.Rep. No 913, 93rd Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811; H.R.Conf.Rep. No. 953, 93rd Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 2862. Although Congressman Quie remarked that the exemption would apply to "employees . . . in rescue or ambulance activities which are substantially related to fire protection . . . activities", 120 Cong.Rec. 8598 (1974), this Court has said remarks of legislators, even sponsors of legislation, are not "a reliable measure of congressional intent." *See Chrysler v. Brown*, 441 U.S. 281, 311 (1979)

By including Petitioners within the §7(k) exemption, the Court of Appeals below did not constrain itself to the statutory language. Rather, the Court enlarged §7(k) to include employees who perform both fire protection and emergency medical activities, (1) regardless of the amount of time devoted to each activity, (2) regardless of the segregation of the activities into two separate and distinct jobs, and (3) regardless of the nature of the emergency medical dispatches. In this respect, the decision conflicts with decisions of this Court mandating that FLSA exemptions not be so enlarged.

B. The Court of Appeals Did Not Construe §7(k) Narrowly Against Respondent

As a corollary to the aforementioned mandate, this Court has repeatedly said that FLSA exemptions must be narrowly or strictly construed against the employer. *Idaho Sheet Metals, Inc. v. Wirtz*, 383 U.S. 190, 208-09 (1966), *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *Mitchell v. Kentucky Finance*, 359 U.S. 290, 295 (1959); *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945)

The Court of Appeals decision below not only failed to construe §7(k) narrowly against Respondent, the decision enlarged the exemption to include employees who are engaged primarily in emergency medical activities. Accordingly, the Court of Appeals decision conflicts with decisions of this Court mandating that FLSA exemptions be construed narrowly.

C. The Court of Appeals Showed No Deference to §553.212(a)

When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. *Udall v. Tallman*, 380 U.S. 1, 16 (1965). *See also, Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)

Since Petitioners specifically argued before the Court of Appeals below that more than 20% of their activities are nonexempt activities, the failure of the Court to even address this argument is effectively a rejection of §553.212(a) and its limitation on nonexempt activities. As such, the decision conflicts with decisions of this Court mandating that Department of Labor regulations be shown "great deference."

II. The Court of Appeals Decision Below Conflicts With Decisions of Other Courts of Appeals.

The decision of the Court of Appeals below conflicts with decisions of other Courts of Appeal in four material respects:

A. The Court of Appeals Did Not Follow this Court's Mandates.

Following this Court's mandates regarding the enlargement of FLSA exemptions, the Fourth, Sixth and Eleventh Circuits

have questioned the application of §7(k) to paramedics. *See Roy v. Lexington County, S.C.*, 141 F.3d 533, 539 (4th Cir. 1998)(". . . the Act itself provides no exemption for EMS workers."); *Justice v. Nashville, Tenn.*, 4 F.3d 1387, 1392 (6th Cir. 1993)(finding "some force" supporting conclusion that §7(k) exemption should not extend beyond statutory categories); *O'Neal v. Barrow County Board of Comm'rs*, 980 F.2d 671, 677 (11th Cir. 1993)("The intention to extend the exemption to ambulance and rescue service employees is not reflected either in the statute itself or in the congressional reports. .") In considering the application of §7(k) to paramedics, therefore, §7(k) "should be very narrowly construed." *Roy*, 141 F.3d at 540; *O'Neal*, 980 F.2d at 677.

Outside the Fifth Circuit, all Courts of Appeals which have construed §7(k) have cited or followed the mandate that FLSA exemptions be construed narrowly against the employer. *See Roy*, 141 F.3d at 540; *Justice*, 4 F.3d at 1392; *Carlson v. Minneapolis, Mn.*, 925 F.2d 264, 265 (8th Cir. 1991); *Spires v. BenHill County, Ga.*, 980 F.2d 683, 689 (11th Cir. 1993); *O'Neal*, 980 F.2d at 676-77. *See also Alex v. City of Chicago*, 29 F.3d 1235 (7th Cir.), *cert denied*, 115 S.Ct. 665 (1994)

The Court of Appeals decision below did not construe §7(k) narrowly, much less very narrowly. Indeed, no Court of Appeals decision, save for *Bond*, has interpreted §7(k) so broadly as to exempt all employees who perform both fire protection and emergency medical activities, (1) regardless of

the amount of time devoted to each activity, (2) regardless of the segregation of these activities into two separate and distinct jobs, and (3) regardless of the nature of the medical emergency dispatches. The decision thus conflicts with the decisions of all other Courts of Appeals which have construed §7(k).

B. The Court of Appeals Did Not Address the 20% Limitation of §553.212(a)

Outside the Fifth Circuit, all Courts of Appeals which have construed §7(k) have agreed that, to avail itself of the exemption, an employer must, **in addition to** the threshold requirements of §553.210(a) or §553.215(a), meet the burden of §553.212(a) and show that an employee spends no more than 20% of his time in nonexempt activities. *West v. Anne Arundel County, Md.*, 137 F.3d 752, 761 (4th Cir. 1998); *Justice*, 4 F.3d at 1397; *Jones v. Columbus, Ga.*, 120 F.3d 248, 252 (11th. Cir. 1997); *Wouters v. Martin County, Fla.*, 9 F.3d 924, 932 (11th Cir. 1994), *cert. denied*, 115 S.Ct. 65 (1994); *O'Neal*, 980 F.2d at 680-81; *Spires*, 980 F.2d at 687-89. *See also Christian v. Gladstone, Mo.*, 108 F.3d 929, 933-34 (8th Cir.), *cert denied*, 118 S.Ct. 557 (8th Cir. 1997); *Alex*, 29 F.3d at 1240.

By analyzing Petitioners' activities under the threshold test of §553.215(a) only, the Court of Appeals' decision below in effect rejected §553.212(a) and its limitation on nonexempt activities. Accordingly, the decision conflicts with decisions of all other Courts of Appeals which have construed §7(k).

C. The Court of Appeals Construed Petitioners' MICU Activities as Fire Protection Activities

That fire department employees who are merely dispatched to fires, but do not fight fires or rescue fire or accident victims, can be exempt under §7(k) is a notion which has been rejected by Courts of Appeals following the threshold test of §553.210(a). In *West*, 137 F.3d at 760-61, the Fourth Circuit found that Emergency Medical Technicians (EMTs) were not employees in fire protection activities, even where they were dispatched to fires, because they performed medical services only and could not and did not fight fires. In *Carlson*, 935 F.2d at 265, the Eighth Circuit held that arson investigators who were dispatched to fires, but who did not fight or extinguish fires, were not exempt under §7(k). *See also Nalley v. Baltimore, Md.*, 796 F.Supp. 194, 200 (D.Md. 1992)

The Eight Circuit in *Christian* underscored the importance of fighting fires: "[p]aramedics who are not permitted to fight fires or enter a burning building and who are only dispatched to fires to treat injured individuals are not engaged in fire protection activities under the four-part test." *Id.* at 933.

The notion that fire department employees who do not fight fires or rescue fire or accident victims can be exempt under §7(k) by virtue of the two-prong test of §553.215(a) has also been soundly rejected by one Court of Appeals. In *West*, the Fourth Circuit did not resort to §553.215(a) after finding that

the EMTs did not satisfy the four-part test of §553.210(a). *See also Nalley*, 796 F.Supp. at 199.

The Eleventh Circuit in *O'Neal* also underscored the limitations of the threshold requirements of §553.215(a):

> the purpose of the "substantially related" standard is obviously to ensure that ambulance and rescue service employees who are acting like firefighters. . . are treated as such, regardless of whether they can be made an "integral part of" the fire. . . department. . . The purpose of the "substantially related" standard is not to cast the exemption net any more broadly than does the "integral part of" test. *Id.* at 677.

In reliance upon *Bond*, the Court of Appeals below regarded Petitioners' MICU activities as fire protection activities under §553.215(a) even though they do not and cannot perform rescues or fight fires. As such, the decision conflicts with the Court of Appeals decisions cited above.

D. The Court of Appeals Regarded Petitioners' Emergency Medical Activities as Fire Protection Activities.

The Fourth, Sixth and Eleventh Circuits agree that emergency medical activities unrelated to fire protection are nonexempt activities subject to the limitation of §553.212(a),

and that employees who engage in such activities for more than 20% of their work time are not exempt under §7(k). *Roy*, 141 F.3d at 539; *West*, 137 F.3d at 761; *Justice*, 4 F.3d at 1398-99; *Jones*, 120 F.3d at 252; *Wouters*, 9 F.3d at 932; *Spires*, 980 F.2d at 688; *O'Neal*, 980 F.2d. at 681.

In *Christian*, the Eighth Circuit agreed that "paramedics who are . . . only dispatched to fires to treat injured individuals are not engaged in fire protection activities." Id. at 933. The Court, however, distinguished the claimants therein who worked as firefighters on every work shift. In determining whether the 20% limitation had been exceeded, the Court asked whether, by performing emergency medical activities in addition to firefighting, "the essential nature of the firefighter's job change[d] and he was required to perform tasks unrelated to his job." Id. at 935.[5] The Court determined that the essential nature of the job did not change and that the firefighters were exempt.

In reliance upon *Bond*, the Court of Appeals below included Petitioners within §7(k) even though each of them spends more than 20% of his time in emergency medical activities unrelated to fire protection. Accordingly, the decision conflicts with decisions in the Fourth, Sixth and Eleventh Cir-

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5. *Christian* created a split even within the Eighth Circuit. *Carlson* recognized the mandate that §7(k) be narrowly construed against an employer. *Id.* at 265. *Christian* neither cited this mandate nor adopted the narrower construction of §553.212(a) advocated by its claimants.

cuits.[6] The decision also goes beyond *Christian* since that opinion does not support the exemption of employees, such as the Petitioners who work as MICU crew members, whose firefighting and emergency medical activities are segregated into separate and distinct jobs.

III. The Court of Appeals Decision Below Creates a Anomalous Legal Standard.

By including within §7(k) employees who perform both firefighting and emergency medical activities (1) regardless of the amount of time devoted to each activity, (2) regardless of the segregation of these activities into two separate and distinct jobs, and (3) regardless of the nature of the medical emergencies, the Court of Appeals below has supplanted a clearly defined standard with no standard at all. Without any limitation on emergency medical activities, such activities can theoretically dominate an employee's activities without taking him out of the exemption. Under the approach of the Court of Appeals below, an employee can ostensibly spend 90% or more of his time in emergency medical activities and only 10% of his time fighting fires and be covered by the exemption. Such an anomalous standard could not have been intended by Congress in enacting §7(k).

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6. The District Court below recognized the conflict between the Fifth Circuit and the other Circuits in this regard. (App. p. 27a, n. 7).

CONCLUSION

For the reasons cited above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-10578

GLENN D. DICKERSON; TROY L. ARMSTRONG; RANDY A. HOLMES; MICHAEL R. BUEHLER; BRENT RODGERS; STEPHEN FULTZ; DOUGLAS S. MALLON; AARON DAVIS; PAUL E. OVERTON; J.B. THOMPSON; DEBORAH DUARTE; VICKIE BURNETT; DAVID DUNNAHOO; LUANNE MASSEY; DARRYL B. HAYES; LONNIE TUTT; LUIS ARISMENDEZ; BILLY R. BANKS; JEROME HENRY; ROBERT KEAVENEY; G.A. McKINNEY; JOHN RODRIGUEZ; DARRELL MAXWELL; CYNTHIA MANION; LORI B. ARENT; FLETCHER DAHMAN; TOD A. GILLIAM; GERALD JENSEN, JR.; CHARLES E. TAYLOR; DONALD BARTON, JR.; THOMAS A. TAYLOR, SR.; MICHAEL HUGHES; STEVEN WISE; JAMES GRAHAM; RICHARD SANTA CRUZ; MARK WILLIAMSON; JOHNNY RUDDER

Plaintiffs-Appellants,

versus

CITY OF DALLAS, TEXAS,

Defendant-Appellee.

Appeal from the United States District Court
For the Northern District of Texas
(3: 96-CV-2174-T)

Before REYNALDO G. GARZA, POLITZ, and BARKSDALE, Circuit Judges

PER CURIAM:*

Plaintiffs, a class of Dallas firefighters also certified as paramedics, appeal the adverse summary judgment in their action seeking overtime compensation under the Fair Labor Standards Act. For the reasons assigned, we affirm.

The facts concerning the nature of the employees' job activities are set forth in careful detail in the trial court's opinion granting summary judgment to the City of Dallas. The court a' *quo* held that the City was not required to pay overtime compensation to plaintiffs because of the FLSA's partial exemption for employees engaged in "fire protection activities.[1]

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* Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4

1 29 C.F.R. §207(k). Rescue and ambulance service personnel are partially exempt if they "form an integral part of the public agency's fire protection activities. See § 553.215." 29 C.F.R. § 553.210(a).

Relying on **Bond v. City of Jackson**,[2] the district court also found that plaintiffs satisfied the "substantially related" test of 29 C.F.R. § 553.215. [3]

We review de *novo* a grant of summary judgment.[4] Our review of the record and briefs, aided by the oral arguments of counsel, discloses no basis for reversal. We conclude that the district court's application of section 553.215's "substantially related" test to the paramedic personnel is supported by the reference to this section in section 553.210(a)'s "integral part" definition. Accordingly, on the facts as found, the authorities cited, and analysis made by the district court in its comprehensive and thorough order granting the City's motion for summary judgment and denying plaintiffs' motion for partial summary judgment signed and filed on March 24, 1998, the judgment appealed is AFFIRMED.

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2 939 F.2d 285 (5th Cir. 1991).

3 Section 553.215, which applies to ambulance and rescue service employees of a public agency other than a fire protection agency, allows ambulance and rescue service paramedics to be exempt from overtime pay if their services are "substantially related" to firefighting in that they have received training in the rescue of fire and accident victims and are "regularly dispatched" to fires, crime scenes, riots, natural disasters, and accidents.

4 **New York Life Ins. Co. v. Travelers Ins. Co.**, 92 F.3d 336 (5th Cir. 1996).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GLENN D. DICKERSON,
TROY L. ARMSTRONG,
RANDY A. HOLMES,
MICHAEL R. BUEHLER, et al.,

Plaintiffs,

v. No. 3:96-CV-2174-T

CITY OF DALLAS,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Before the Court are cross-motions for summary judgment filed by the parties. After consideration, the Court is of the opinion that Defendant's motion for summary judgment should be granted, and Plaintiffs' motion for partial summary judgment should be denied.

Named plaintiffs and class members (collectively, Plaintiffs) bring this class action suit against Defendant City of Dallas for alleged violations of § 7(a) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 207. Plaintiffs, certified paramedics who are current or former employees of the fire department of Defendant City of Dallas, claim that Defendant has failed to pay them overtime compensation for hours worked in excess of 40 hours per week. Defendant asserts that plaintiffs are only entitled to partial overtime compensation pursuant to §207(k). At issue is whether Plaintiffs are employees engaged in fire protection activities such that they come under the exemption from general overtime compensation found in § 207(k).

Summary judgment should be entered only where the record establishes that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law FED. R. CIV. P. 56(c). The movant bears the burden of establishing the propriety of summary judgment. *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986)

Once a properly supported motion for summary judgment is made, the adverse party must set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The substantive law will identify what facts are material. *Id.* at 248. A dispute as to a material fact is "genuine" only if the evidence is such that

a reasonable jury could return a verdict for the nonmoving party. *Id.*

The parties largely agree that there are no disputed fact issues regarding the exempt status of the employees which would prevent a decision on summary judgment. Summary judgment is in fact an appropriate mechanism for resolving issues of law arising from a materially complete factual record. See *Trevino v. Yamaha Motor Corp.*, 882 F.2d 182, 184 (5th Cir. 1982). Furthermore, disputes over the legal inferences to be gleaned from the facts in evidence will not prevent summary judgment; thus, where a nonmovant merely debates the consequences flowing from admitted facts, summary judgment is proper. *See Beck v. Somerset Technologies, Inc.*, 882 F.2d 993, 998 (5th Cir. 1989). It is also clear that "[w]hen everything that can be adduced at trial is before the judge . . . and the parties, while urging conflicting ultimate facts or conclusions, have no evidentiary disputes, a trial serves no useful purpose." *Brown v. United States*, 890 F.2d 1329, 1334 (5th Cir 1989)(citing Fontenot v. Upjohn Co., 780 F.2d 1190, 1197 (5th Cir. 1986)). Summary judgment is always appropriate when there is no need to put the parties or the court to the time and expense of a trial.

Section 207 (a) of the FLSA mandates that an employer must pay its employees overtime compensation for all hours worked in excess of 40 hours per week. 29 U.S.C. §207(a). Absent an exemption from this provision, failure to pay over-

time compensation is an actionable violation of the FLSA. Section 207(k), however, provides a partial exemption for public agencies as to its employees who engage in fire protection or law enforcement activities. 29 U.S.C. § 207(k). Under §207(k), fire protection officers must work a total of 212 hours during a work period of 28 days before earning overtime compensation. This allows the use of rotating schedules wherein employees work shifts of 24 hours on duty followed by 48 hours off duty. For purposes of this order, the Court will refer to the partial exemption of §207(k) as, simply, an "exemption" and will refer to an employee who might fall under this partial exemption as "exempt."

Whether an employee is exempt under the FLSA is determined primarily from the facts, but ultimately it is a question of law. *Smith v. City of Jackson, Miss.*, 954 F.2d 296, 298 (5th Cir. 1992). Exemptions are to be narrowly construed against the employer, and the burden to prove the applicability of an exemption is on the employer. *Id.*

Section 207(k) does not define an employee engaged in fire protection activities. The Department of Labor (DOL), however, has promulgated regulations which define an employee engaged in fire protection activities, as discussed below. Plaintiffs claim that, based on these regulations, they are not engaged in fire protection activities sufficient to bring them under the exemption of § 207(k), while Defendant argues that

Plaintiffs are fire protection employees and, thus, exempt. This issue can only be resolved by examining the facts.

The undisputed facts here show that Defendant's fire department has no position of employment called "paramedic." Rather, an employee with paramedic certification is designated as a fire and rescue officer, which is an entry level position, or as a driver engineer, which is one promotion level up from that of a fire and rescue officer. Defendant cross-trains its fire and rescue officers and driver engineers such that all those employees with paramedic certification are also trained firefighters. No employee spends 100 percent of his or her work hours as a paramedic.

All fire and rescue officers receive 976 hours of training at the Dallas Fire Academy. This training teaches skills and use of equipment on topics such as:forcible entry, fire extinguishers, tire service ladders, fire service hoses, fire apparatus, hazardous materials, and CPR. Those officers who also achieve paramedic certification receive an additional 794 hours of training at the University of Texas Southwestern Medical School. This training includes: medical terminology, anatomy and physiology, EKG application, drug administration, infection control, respiratory emergencies, defibrillation, behavioral emergencies, water emergencies, head and neck trauma, burns, triage, and disaster management.

Defendant employs 744 fire and rescue officers, of which 360 are also certified paramedics. Defendant also employs 356 driver engineers, of which 76 are also certified paramedics.[1] For ease of reference, the Court will refer to fire and rescue officers and driver engineers who are also certified paramedics as, simply, paramedics.

Management of the Emergency Operations of Defendant's fire department is divided into three divisions: Division 1, Division 2, and Emergency Medical Services (EMS). Driver engineers and fire and rescue officers are included under the management of Divisions 1 and 2, and paramedics are under the EMS division. Under this structure, when fire and rescue officers and driver engineers are performing firefighter duties, they are under the supervision of Divisions 1 and 2. When they are performing paramedic duties, they are under the supervision of the EMS Division. Paramedics and fire and rescue officers are, nevertheless, governed by the same fire department policies for hiring, promotion, training, and discipline.

Defendant operates 55 fire stations, of which 27 have full time mobile intensive care units (MICUs). Paramedics are

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[1] It appears that, at some point, the Dallas Fire Department began requiring that all new fire and rescue officers hired must receive paramedic certification. In theory then, at some point, all firefighters could become paramedics.

housed at fire stations with non-paramedic fire and rescue officers and are, ultimately, under the command of the same station officer.

Paramedics and non-paramedics work together in the maintenance of the fire station and equipment. They also train together in continuing education courses. Paramedics are not required to perform any outside work for the City of Dallas or the Dallas Fire Department such as picking up trash, cutting trees, or participating in recycling projects.

Paramedics are compensated based on an hourly rate of pay, and a pay period is two weeks in length. Paramedics spend 50 percent of their work hours per pay period assigned as fire and rescue officers, which means that during that time they are assigned to the crew of a fire apparatus (fire truck or fire engine) Paramedics spend the other 50 percent of their work hours per pay period assigned as paramedics to the crews of MICUs. This 50/50 paramedic rotation was designed to maintain competency in the performance of both paramedic duties and fire and rescue officer duties. A typical work shift is 24 hours, during which time paramedics generally work the entire shift either as an MICU crew member or as a fire apparatus crew member.

According to the Dallas Fire Department Manual of Procedures, a fire apparatus and an MICU are dispatched together on all of the following calls: major accidents; heart

attacks; unconscious persons; breathing difficulties and other emergencies; and if the ambulance is more than six minutes away from the scene. In addition, fire and rescue officers routinely call paramedics for medical assistance on the scene of an emergency.

EMS dispatch records-those where an MICU was sent out-from August 2, 1993, until February 1, 1997, show that major accidents, heart attacks, unconscious persons, and breathing difficulties accounted for 40.9 percent of all dispatches of the paramedics. Thus, paramedics and fire and rescue officers were dispatched together on at least 40.9 percent of all *paramedic dispatches.*

Fire department dispatch records show that from August 2, 1993, until February 1, 1997, 57.9 percent of all fire dispatches-those where fire trucks or fire engines were sent out-were to assist an ambulance or assist an MICU on a major accident. Thus, paramedics and fire and rescue officers were dispatched together on at least 57.9 percent of all *fire dispatches.*

Plaintiffs are current and former employees of Defendant who have been assigned to work in the fire department within the period from August 2, 1993, through the present. During this time, plaintiffs were and are certified paramedics holding positions as either fire and rescue officers or driver engineers.

Plaintiffs typically work 212 hours per 28 days. Defendant has not compensated plaintiffs at one and a half times their regular hourly rate for hours worked in excess of 40 hours but less than 53 hours per week, for hours worked in excess of 80 hours but less than 106 hours per 14 days, or for hours worked in excess of 160 hours but less than 212 hours per 28 days. Pursuant to § 207(k) Defendant has compensated Plaintiffs at one and a half times their regular hourly rates for hours worked in excess of 53 hours per week, 106 hours per 14 days, or 212 hours per 28 days.

The DOL regulation which defines a fire protection employee states in part:

> the term "any employee . . . in fire protection activities" refers to any employee (1) who is employed by an organized fire department or fire protection district; (2) who has been trained to the extent required by State statute or local ordinance; (3) who has the legal authority and responsibility to engage in the prevention, control or extinguishment of a fire of any type; and (4) who performs activities which are required for, and directly concerned with, the prevention, control or extinguishment of fires, including such incidental non-firefighting functions as housekeeping, equipment maintenance, lecturing, attending community fire drills and inspecting homes and schools for fire hazards.

29 C.F.R. § 553.210 (a) (1997). In addition to this four-part test, the regulation also states "The term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities. See § 553.215." *Id.*

From the record before the Court, it appears beyond dispute that Plaintiffs meet the four-part test set out by the DOL in § 553.210. Each and every plaintiff is employed by the fire department and has been trained beyond that required for state certification as a firefighter. At least half of Plaintiffs' work hours are spent assigned to the fire apparatus, during which time Plaintiffs are required to engage in and they actually perform activities which are required for the prevention, control, and extinguishment of fires. As such, Plaintiffs are employees who perform fire protection activities within the meaning of § 553.210 and appear to be exempt under § 207 (k).

Section 553.210 also provides for rescue and ambulance service personnel such as paramedics to be included as exempt personnel if they "form an integral part of the public agency's fire protection activities." On the face of it, Plaintiffs appear to fit within this definition of fire protection officers as well because they spend half of their work hours serving as firefighters assigned to fire apparatus. Additionally, Plaintiffs make up almost half of all firefighters for the City of Dallas. These two facts alone would indicate that Plaintiffs are an integral part of Defendant's fire protection activities as contem-

plated by § 553.210. This section, however, also makes reference to § 553.215 in the context of rescue and ambulance personnel.

> Section 553.215 states in part:
>
> > Ambulance and rescue service employees *of a public agency other than a fire protection or law enforcement agency* may be treated as employees engaged in fire protection or law enforcement activities . . . if their services are substantially related to firefighting or law enforcement activities in that (1) the ambulance and rescue service employees have received training in the rescue of fire, crime, and accident victims or firefighters or law enforcement personnel injured in the performance of their respective duties, and (2) the ambulance and rescue service employees are regularly dispatched to fires, crime scenes, riots, natural disasters and accidents.

29 U.S.C. § 553.215(a) (emphasis added) . The two-part test above is known as the "substantially related" test. On its face, this particular regulation does not apply to plaintiffs because they are employees of a fire department. In the only case on point in this circuit, however, the Court of Appeals for the Fifth Circuit applied, without explanation, the substantially related

test to employees of a city fire department.[2] *See Bond v. City of Jackson, Miss.*, 939 F.2d 285, 287-288 (5th Cir. 1991). Although the Court concludes that plaintiffs are fire protection officers under § 553.210, following *Bond's* example, this Court applies the test in § 553.215 as well.

A DOL Wage and Hour Division Administrative Letter Ruling sheds some light on the application of the substantially related test to paramedics. The letter ruling states in part:

> [W]e set forth two tests for determining if the activities of EMTs are"substantially related" to fire protection or law enforcement as described in section 553.215. . . . The first test requires that EMTs be trained to rescue individuals who have been injured or who are in danger of being injured. . . . Therefore, we interpret the requirement that an EMT be "trained to rescue as meaning that the individual has knowledge of the basic life-saving procedures and life support procedures (i.e. CPR, administering oxygen, and extrication techniques) . However, it is not necessary for an EMT to routinely perform any or all of these procedures in order to meet the requirements of the first test referred above.

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2 At least one circuit has held § 553.215 inapplicable to employees of a fire department. *See Wouters v. Martin County, Fla., 9* F.3d 924, 929 (11th Cir. 1993).

> The second test to determine if activities are "substantially related" to fire protection or law enforcement is that EMTs must be "regularly dispatched" to such things as fires or accidents. . . . *There is no specific frequency of occurrence which establishes "regularity"; it must be determined on the basis of the facts of each case.*

Bond, 939 F.2d at 287-88 (quoting DOL, Wage & Hour Div., Ltr. Rul. (Oct. 9, 1987)) (emphasis added). The Court determines that Plaintiffs easily meet the first part of the substantially related test. On the record before the Court, there is no question that Plaintiffs, as firefighters, are trained in - and actually perform-rescues of fire, crime, and accident victims or service personnel injured in the course of duty.

It is the second part of the substantially related test that is at issue here. Defendant claims that, based on the percentage of calls where both the fire apparatus and the MICU are called together, it is clear that the paramedics are dispatched regularly to fire protection and law enforcement incidents. Defendant further asserts, with supporting evidence, that paramedics and firefighters often work side-by-side at accident scenes and, occasionally, paramedics must engage in rescue and extrication of victims at the scene before the fire and rescue officers arrive. From these facts, Defendant argues that paramedics are regularly dispatched within the meaning of part two of the substantially-related test and that, overall, the paramedics'

duties are substantially related to fire and rescue protection. Defendant further argues that, because *Bond* held that the paramedics there were engaged in activities substantially related to fire protection activities, and because *Bond's* facts are far less compelling than those of this case, this Court should conclude that Plaintiffs' duties in this case are substantially related to fire protection activities within the meaning of the regulation.

In *Bond*, paramedics filed suit against the City of Jackson, Mississippi, on the same premise as Plaintiffs here: that they were not fire protection officers within the meaning of the exemption in §207(k) and, therefore, the city violated the FLSA in failing to pay them appropriate overtime compensation. *Bond v. City of Jackson*, 939 F.2d 285 (5th Cir. 1991). In the district court, the jury found that the paramedics were not firefighters within the meaning of § 207(k). On appeal, the Fifth Circuit reversed, holding that the paramedics were exempt from general overtime compensation under the statute because they were employees engaged in fire protection activities.

In *Bond*, the plaintiffs were emergency medical technicians (EMTs) and paramedics employed in the EMS division of the city's fire department. 939 F.2d at 286. The plaintiffs were housed in fire stations with firefighters and shared upkeep duties at the stations with the firefighters from the fire department's Combat division. *Id.* The plaintiffs were dispatched regularly to fires, accidents, and crime scenes, but

only if there was an injury or potential for an injury. *Id.* Further, EMS personnel often worked side-by-side with firefighters at the accident scene, and in over 90 percent of the calls to which EMS ambulances responded, additional units from the fire department also responded. *Id.* Although the plaintiffs' primary duties were to provide medical care and to transport patients to hospitals, they sometimes assisted rescue personnel in removing injured persons from autos. *Id.* The plaintiffs were not trained firefighters and apparently spent all of their work hours acting as paramedics. *Id.*

Additionally, the EMS division, under which the plaintiffs were managed, functioned more autonomously than other divisions in the fire department. *Id.* The EMS division's policies and procedures varied from those of the fire department in the areas of hiring, payroll, fringe benefits, badges, uniforms, chain of command, promotional opportunities, in-service training, and rank structure. *Id.* at 286-87.

In analyzing that case, the Fifth Circuit briefly addressed the integral-part test of 29 C.F.R. § 553.210[3] which relates to ambulance and rescue personnel and, without explaining why, proceeded to the substantially-related test of § 553.215.[4] *Id.* at

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[3] The four-part test of § 553.210 obviously would not apply as the plaintiffs were not trained as firefighters *Id.* at 288.

[4] As discussed earlier in this Court's opinion, § 553.215 does not appear, to

287. Relying on the DOL's letter ruling explanation of the substantially related test, the court stated:

> plaintiffs themselves testified that they spend most of their time responding to accidents. In over ninety percent of the EMS calls, the EMS ambulances co-respond with one or more other units from the fire department. The plaintiffs' own testimony established that EMS ambulances were regularly dispatched to accidents and thus clearly satisfied this prong of the test.

Id. at 288. This represents the sum total of the Fifth Circuit's analysis of the second prong.[5] Defendant argues that *Bond* interprets the second part of the test broadly and, therefore, so should this Court.

Plaintiffs counter that only those paramedics who act like firefighters who perform rescue or other activities traditionally performed by firefighters are meant to be included within the substantially related standard. Plaintiffs argue that

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apply to ambulance and rescue service employees who are employed by a fire department as were the plaintiffs in *Bond*. Nevertheless, because the Fifth Circuit relied on this test, this Court will do so as well.

5 The remainder of the opinion addresses only the application of the first part of the test, which deals with whether employees are trained in rescue. The Court has already concluded that Plaintiffs here meet the training part of the test.

Bond's reasoning is flawed because a case on which it relied in reaching its decision, *O'Neal v. Barrow County Bd. of Comm'rs*, *743* F. Supp. 859 (N.D. Ga. 1990), has since been reversed on appeal. *See O'Neal v. Barrow County Bd. of Comm 'rs*, 980 F.2d 674 (11th Cir. 1993).

The Court concludes that Plaintiffs misconstrue the Fifth Circuit's reliance on the *O'Neal* case in *Bond*. In the context of addressing whether the plaintiffs in *Bond* met the first part of the substantially related test, regarding training in the rescue of fire and accident victims, the Fifth Circuit explained that it chose to follow the reasoning in the *O'Neal* case because it was compatible with the DOL regulations and letter ruling. Specifically, the *Bond* court stated:

> The court in *O'Neal* found that it was enough that the plaintiffs had "received training in the activities paramedics and EMTs are commonly understood to perform, i.e., to provide necessary emergency treatment at the scene of a fire, accident, etc. to stabilize a patient. . . ." Because the EMS personnel [in *Bond*] were trained in "basic life-saving procedures," we conclude that they satisfy this prong of the test.

Bond, *939* F.2d at 288 (citations omitted). The Fifth Circuit does not discuss *O'Neal* further in its opinion. Thus, any

reliance by the Fifth Circuit on *O'Neal* is limited to that case's application of the first prong of the substantially related test.

Because it is undisputed that all Plaintiffs in the case at bar were trained as firefighters in rescue and fire protection activities, including basic life-saving procedures, there is no issue as to whether Plaintiffs meet the first part of the test regarding training. Therefore, it does not matter that the Fifth Circuit, in applying that first part of the test, may have relied on an opinion that has now been reversed. In any event, *Bond* represents the Fifth Circuit's own interpretation of § 207(k) and the accompanying regulations and related DOL letter rulings. How another circuit interprets the same material is not binding on the Fifth Circuit, nor does it undermine the viability of the opinion as binding precedent for this Court.

As to the second part of the test, the record shows that Plaintiffs are regularly dispatched to fires and accidents. To determine "regularly dispatched," *Bond* looked at the percentage of total EMS calls where EMS ambulances co-responded with another unit from the fire department-90 percent-and, more generally, whether the plaintiffs were regularly dispatched to accidents.

In the instant case, the record reveals that 40.9 percent of all MICU dispatches were co-responses with fire apparatus. Furthermore, Plaintiffs assert that they are dispatched to fires and accidents where there is a report of or likelihood of injury.

While these numbers do not appear to approach the 90 percent mark found in *Bond*, the crucial distinction in comparing that case to this one is that Plaintiffs here *are firefighters* and spend half of their time working in that capacity rather than as paramedics.

If during 50 percent of Plaintiffs' total work hours they are assigned as fire and rescue officers during which time Plaintiffs are held in readiness to be and actually are dispatched to fires and accidents-and if during Plaintiffs' paramedic rotation they corespond to accidents and fires where injuries are reported or are likely, then it would appear that Plaintiffs are "'regularly dispatched' to such things as fires or accidents," as interpreted by the DOL in its letter ruling of October 9, 1987. The fact that the fire and rescue officers and the paramedics were dispatched together on 57.9 percent of all fire apparatus calls, not all of which involved accidents or fires, further bolsters the conclusion that paramedics' activities are substantially related to those of the fire and rescue officers. In light of *Bond's* broad interpretation of §553.215 and the unique facts of this case, the Court concludes that Plaintiffs meet the substantially related test.

The inquiry into Plaintiffs' exempt status does not end here, however, as Plaintiffs claim that a third regulation, 29 C.F.R. § 553.212, takes them out of the exemption altogether. This regulation states:

> Employees engaged in fire protection or law enforcement activities as described in §§ 553.210 and 553.211 may also engage in some nonexempt work *which is not performed as an incident to or in conjunction with their fire protection activities.* For example, firefighters who work for forest conservation agencies may, during slack times, plant trees and perform other conservation activities unrelated to their firefighting duties. The performance of such nonexempt work will not defeat [the § 207(k) exemption] unless it exceeds 20 percent of the total hours worked by that employee during the workweek or applicable work period. A person who spends more than 20 percent of his/her working time in non-exempt activities is not considered to be an employee engaged in fire protection activities for purposes of this part.

29 C.F.R. § 553.212(a) (emphasis added) . This is known as the 80/20 rule or the 20 percent rule.

Plaintiffs argue that, as paramedics, they spend more than 20 percent of their time on non-exempt activities. Plaintiffs define non-exempt work as time spent on medical emergencies other than fires, riots, crime scenes, and natural disasters, and they cite several cases supporting this position.[6]

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6 *Wouters v. Martin County, Fla.*, 9 F.3d 924, 932 (11th Cir. 1993), *cert.*

Defendant responds that none of the cases which Plaintiffs rely on are binding precedent for this Court, as all are from outside the Fifth Circuit, and that these cases cannot serve as persuasive authority because the facts of each are distinct from those of the instant case. Specifically, Defendant argues that none of the paramedics in any of these other cases actually serve as firefighters *and* paramedics. Additionally, Defendant points out that in *Bond*, the Fifth Circuit, when faced with facts similar to those of the other cases which Plaintiffs cite, did not apply the 20 percent rule of § 553.212.

The Court has carefully reviewed all of the cases which Plaintiffs cite and reaches the same conclusion as Defendant: none of these cases involve cross-trained paramedics who also serve in active duty as firefighters. As such, their value as precedent, if any, for this case is limited.

Although *Bond* is inexplicably silent as to how § 553.212 fits into the scheme of exemptions under § 207 (k), its ultimate holding is instructive as to the Fifth Circuit's interpretation of the § 207(k) exemption. While other circuits split hairs over the precise percentage of hours during which

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denied, 115 S. Ct. 65 (1994); *Justice v. Metropolitan Govt. of Nashville*, 4 F.3d 1387, 1397 (6th Cir. 1993); *O'Neal*, 980 F.2d at 680-82; *Spires v. Ben Hill County*, 980 F.2d 683, 687-89 (11th Cir. 1993); *Roy v. Lexington County, South Carolina*, 928 F.Supp. 1406, 1415 (D.S.C. 1996); *Horan v. King County, Washington*, 740 F. Supp. 1471, 1479 (W.D. Wash. 1990); *Littlefield v Town of Old Orchard Beach*, 780 F. Supp. 64, 68 (D. Me. 1992).

paramedics engage in exempt work, the Fifth Circuit takes a broader approach, one which seems more sensible in light of the plain language of § 553.210 and § 553.215.

This approach also makes sense when considering the only example of non-exempt work given in § 553.212: where firefighters work for forest conservation agencies, planting trees during slack time. There appears to this Court to be a marked distinction between, on the one hand, planting trees and, on the other, performing life-saving paramedic duties unrelated to fires or auto accidents, as Plaintiffs do here. The latter is clearly much closer in substance to rescue and fire protection than the former.

This Court's view finds support in a relatively recent case that is factually consistent with the case at bar. In *Christian v. Gladstone, Mo.*, 108 F.3d 929 (8th Cir.), *cert. denied*, 118 S. Ct. 557 (1997), the plaintiffs were cross-trained firefighters and paramedics, as Plaintiffs are here, who claimed that they were not exempt because they spent more than 20 percent of their time working on medical emergencies that did not stem from fire protection activities such as car accidents or fires. The Eighth Circuit disagreed, stating:

> [T]he stipulated facts show that the paramedics respond to fires, fight them, and provide paramedic services at those fires, *as well as on calls not involving fires.* Nearly all of their time is spent on such activities,

> related training, support services, and waiting for calls, and they do not spend much time on activities unrelated to their firefighting *or emergency medical service activities.* Providing paramedic services on accident and medical emergency calls *not stemming from a fire or car accident does not alter the nature of their duties or cause them to perform tasks unrelated to their job.*

Christian, 108 F.3d at 934 (emphasis added) . This case stands for the proposition that the 20 percent rule cannot be narrowly applied to prohibit an exemption where cross-trained paramedic firefighters engage in significant emergency medical activities unrelated to fires or accidents. In reaching this conclusion, the Eighth Circuit relied on *Bond*, explaining that the Fifth Circuit did not apply the 20 percent rule because it found that the paramedics in that case were substantially related to fire protection and frequently co-responded with the fire and police departments.

The record here is very similar to that in *Christian* and certainly more compelling than that in *Bond*. In line with these two cases, this Court concludes that the nature of rescuing and providing life-saving measures, whether in fire protection, accidents, or other medical emergencies, is so similar that the Court cannot say that such activities are non-exempt within the meaning of § 553.212. As such, the Court determines that the

20 percent rule does not pull Plaintiffs out of the exemption Defendant established under § 207(k).[7]

The Court concludes that Defendant has met its burden to prove that Plaintiffs are exempt under 29 U.S.C. § 207(k). Accordingly, the Court grants Defendant's motion for summary judgment and denies Plaintiff's motion for partial summary judgment. Plaintiffs shall take nothing by way of their suit against Defendant.

It is therefore **ORDERED** that Defendant's Motion for Summary Judgment, filed on August 1, 1997, is hereby **granted.**

It is **FURTHER ORDERED** that Plaintiff's Motion for Partial Summary Judgment, filed on July 31, 1997, is hereby denied.

Signed this day of March, 1998.

/s/ Robert B. Maloney
Robert B. Maloney
U.S. District Court Judge

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7 The Court is fully aware that such a conclusion directly contradicts that of courts in other circuits, but this Court is constrained to follow the example of *Bond*. If the paramedics in that case were exempt, then surely the facts of this case compel the conclusion that Plaintiffs must be exempt as well.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GLENN D. DICKERSON,
TROY L. ARMSTRONG,
RANDY A. HOLMES,
MICHAEL R. BUEHLER,
et al., Plaintiffs,

v. No. 3:96-CV-2174-T

CITY OF DALLAS,
Defendant.

FINAL JUDGMENT

This action came before the Court, Honorable Robert B. Maloney, presiding, and the issues having been duly considered and a decision having been rendered:

It is **ORDERED** and **ADJUDGED** that Plaintiffs' complaint herein against Defendant City of Dallas is **dismissed with prejudice.**

It is **FURTHER ORDERED** and **ADJUDGED** that all relief not specifically granted herein is denied.

Signed this 24 day of March, 1998.

/s/ Robert B. Maloney
Robert B. Maloney
U.S. District Court Judge

29 U.S.C. §207(k)

No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if --

> (1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or
>
> (2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in which his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days,

compensation at a rate less than one and one-half times the regular rate at which he is employed.

29 C.F.R. § 553.210(a)

As used in sections 7(k) and 13(b)(20) of the Act, the term "any employee . . . in fire protection activities refers to any employee (1) who is employed by an organized fire department or fire protection district; (2) who has been trained to the extent required by State statute or local ordinance; (3) who has the legal authority and responsibility to engage in the prevention, control or extinguishment of a fire of any type; and (4) who performs activities which are required for, and directly concerned with, the control or extinguishment of fires, including such incidental non-firefighting functions as housekeeping, equipment maintenance, lecturing, attending community fire drills and inspecting homes and schools for fire hazards. The term would include all such employees, regardless of their status as "trainee," "probationary," or "permanent," or of their particular specialty or job title (e.g. firefighter, engineer, hose or ladder operator, fire specialist, fire inspector, lieutenant, captain, inspector, fire marshal, battalion chief, deputy chief or chief), and regardless of their assignment to support activities of the type described in paragraph (c) of this section, whether or not such assignment is for training or familiarization purposes, or for reasons of illness, injury or infirmity. The term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities. See §553.215

29 C.F.R. §553.212(a)

Employees engaged in fire protection or law enforcement activities as described in §§ 553.210 and 553.211, may also engage in some nonexempt work which is not performed as an incident to or in conjunction with their fire protection or law enforcement activities. For example, firefighters who work for forest conservation agencies may, during slack times, plant trees and perform other conservation activities unrelated to their firefighting duties. The performance of such nonexempt work will not defeat either the section 13(b)(20) or 7(k) exemptions unless it exceeds 20 percent of the total hours worked by that employee during the workweek or applicable work period. A person who spends more than 20 percent of his/her working time in nonexempt activities is not considered to be an employee engaged in fire protection or law enforcement activities for purposes of this part.

29 C.F.R. 553.215(a)

Ambulance and rescue service employees of a public agency other than a fire protection or law enforcement agency may be treated as employees engaged in fire protection or law enforcement activities of the type contemplated by sections 7(k) and 13(b)(20) if their services are substantially related to firefighting or law enforcement activities in that (1) the ambulance and rescue service employees have received training in the rescue of fire, crime, and accident victims or firefighters or law enforcement personnel injured in the performance of their respective, duties, and (2) the ambulance and rescue service personnel are regularly dispatched to fires, crime scenes, riots, natural disasters and accidents. As provided in §553.213(b), where employees perform both fire protection and law enforcement activities, the applicable standard is the one which applies to the activity in which the employee spends the majority of work time during the work period.